IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.270 OF 1989

Shivaji Krishna Kadam .. Appellant

Versus

Rama Kesu Potekar and Ors. .. Respondents

Mr.R.G.Ketkar for appellant

Mr.Pramod G.Pawar for respondents

CORAM : P.V.KAKADE, J.

DATE : 19TH AUGUST, 2005.

P.C.:

1. Heard both sides.

2. The present second appeal is filed challenging the judgment and decree dated 7.9.1998, passed by the learned District Judge, Satara in Regular Civil Appeal No.38 of 1986 arising from the judgment and decree dated

30.9.1985 passed by learned IVth Joint Civil Judge, Junior Division, Satara in Regular Civil Suit No.151 of 1983 whereby the Court's below have decreed the suit for partition filed by the Respondent No.1 and 2 herein holding that respondent nos.1 to 5 herein are entitled to 1/2 share in the suit property.

3. The respondent no.3 to 5 are served. It appears from the record that the Respondent nos.3 to 5 have not contested the present proceedings and have adopted the case of the Respondent Nos.1 and 2 original plaintiffs.

4. In the present case the appellant-original sole contesting defendant no.1 has resisted the suit on the ground that he is exclusive owner of the suit property by way of registered Will dated 12.5.1947. The court's below though held that Will is validly executed, it was also held that it was not safe to rely upon it as the said Will was not acted upon for a considerable period of 22 years.

5. The Will is not disputed by the Respondent. The only challenge to the Will before the Courts below was about the capacity of the deceased Mahadu to bequeath

his undivided share in the joint family property.

6. Considering the facts of the present case the ends of justice could be met by passing following order, in view of submissions made by both sides.

7. The impugned judgment and decree dated 7.9.1998 passed by learned District Judge Satara in Regular Civil Appeal No.38 of 1986 arising from the judgment and decree dated 30.9.1985 passed by learned IVth Joint Civil Judge, Junior Division, Satara in Regular Civil Suit No.151 of 1983 is hereby modified as follows :

> It is hereby declared that the respondent nos.1 to 5 have got 1/4th share in the suit property and the appellant has 3/4th share in the suit property. The appellant and the respondent nos. 1 to 5 shall be put in separate possession of the property coming to their share by metes and bounds.

8. The partition shall be effected by the Collector or his sub-ordinate gazetted officer in respect of suit lands mentioned at Serial Nos.1 to 16 in paragraph 1 of

the Plaint, while partitioning of the suit house no.39 mentioned at Serial No.17 in paragraph 1 of the plaint the same may be effected by appointment of Court Commissioner.

9. The question of mesne profit will be decided between the parties at the time of actual partition.

10. Accordingly appeal stands disposed of with no order as to costs.

. Decree be drawn accordingly. C.c. expedited.